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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MESHACH PALACIOS, Defendant and Appellant.	F062060 (Super. Ct. No. VCF205515) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Michelle May, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Meshach Palacios of: (1) the murder of Luis Molina (Pen. Code, §187, subd. (a);[1] count 1); (2) aggravated mayhem of Luis Molina (§ 205; count 2);

[1] Undesignated statutory references are to the Penal Code.

(3) attempted voluntary manslaughter of Andela Landeros (§§ 664, 192, subd. (a)), as a lesser included offense of attempted murder (count 3); and (4) aggravated mayhem of Andela Landeros (§ 205; count 4). On all counts, the jury found true allegations of personal and intentional discharge of a firearm (§ 12022.53, subd. (d)) and that the crimes were committed for the benefit of, or in association with, a criminal street gang (§ 186.22, subd. (b)). The jury also found true allegations on counts 3 and 4 that Palacios personally inflicted great bodily injury on Andela Landeros (§ 12022.7, subd. (a)).

At sentencing, the parties stipulated to an amendment of the fifth count in the information, which had charged Palacios with the attempted murder of N.H. and had been severed from the trial of counts 1 through 4, to charge a violation of section 246.3. Palacios pled no contest to the amended count 5 in exchange for a concurrent two-year term. The trial court sentenced Palacios to state prison for 50 years to life computed as follows: count 1 – 25 years to life, plus 25 years to life pursuant to section 12022.53, subdivision (d); count 2 – a concurrent 15 years to life, plus 25 years to life pursuant to section 12022.53, subdivision (d); count 4 – a concurrent 15 years to life, plus 25 years to life pursuant to section 12022.53, subdivision (d); count 3 – a concurrent determinate term of three years, plus four years (§ 12022.5, subd. (a)) plus five years (§ 186.22, subd. (b)(1)(B)), stayed pursuant to section 654; and count 5 – a concurrent determinate term of two years.

On appeal, Palacios contends (1) the trial court prejudicially erred when it admitted evidence of two prior fights he was involved in for the purpose of permitting a gang expert to opine that Palacios had a gang motivation to commit the current crimes; (2) there is insufficient evidence to support the aggravated mayhem convictions in counts 2 and 4; (3) the jury instruction on aggravated mayhem was erroneous, requiring the reversal of his convictions on counts 2 and 4; and (4) the abstract of judgment should be amended to reflect the trial court's imposition of a concurrent term on count 4. We agree with the last contention. We also agree with the Attorney General that the abstract of

judgment must also be corrected to reflect the trial court's imposition of a two-year concurrent sentence on count 5. In all other respects, we affirm the judgment.

STATEMENT OF FACTS

When Yesenia Landeros returned home at about 11 p.m. on June 22, 2008, she noticed a lot of people in front of the house across the street.[2] Yesenia recognized two women in the group – Angela and Mariella; the rest of the group was male. Yesenia went inside the house. Yesenia's sister, Rosa Landeros, and Rosa's friend, Sandy Ruiz, returned to the Landeros home at about 1 a.m. on June 23. They noticed a group of about 10 people across the street. Rosa heard the group call out "scraps" and use the term "North Side[,]" while Yesenia testified that Angela walked towards Rosa, called her a "scrap," said she wanted to fight, and yelled "Norte." Rosa and Ruiz went inside the house.

A while later Rosa learned that her fiancé, Luis Molina, was on his way to the Landeros home, where he also lived. She went outside to wait for him to return as she knew the group across the street would try to fight or tell him something. Andela Landeros, Yesenia's and Rosa's mother, followed Rosa outside and tried to get her to go back inside. Molina drove up in his sports utility vehicle (SUV) with music playing loudly. Rosa walked towards the middle of the driveway. As Molina got out of the car, the group, including Angela and Mariella, came toward the Landeros home. A male voice yelled "scraps" and "North Side."

Molina walked to the rear of his SUV and stood beside it facing the approaching group. His hands were empty. Rosa was arguing with Andela; she tried to get away from Andela so she could help Molina because she thought he was going to get "jumped." Yesenia, who was inside the house, heard Rosa call her name. Yesenia

[2] For brevity, with no disrespect, subsequent references to witnesses who have the same surname as other witnesses are by first name only.

looked outside the window and saw the group from across the street running toward the Landeros home, yelling. Yesenia and Ruiz went outside.

Ruiz saw a guy lift a bat over his head as if to hit Molina. Rosa, who was only a couple steps away from Molina, heard a gunshot. Yesenia saw who was shooting; he was in the back of the group wearing a white t-shirt. Both Yesenia and Ruiz ran back into the house, and Yesenia called the police.

A male wearing a white t-shirt emerged from the group with a large shotgun and started shooting. Rosa saw Molina's body "going back," taking the shots. Rosa yelled for the gunman to stop. Molina fell after the fifth shot. At one point the gunman stood over Molina. When the last shot was fired, the group ran as a police car arrived with its lights on. The last person to run off was the shooter.

The third of five shots was fired in Rosa's direction. Andela was right behind Rosa. Andela testified the shooter shot at her when she made a move to close the gate to the fence that surrounded her house. The shot hit her on the right side of her face. Andela noticed blood pouring down her body and ran inside to get a towel. Her right eye was injured and she could no longer see out of it. She has had two surgeries to her eye, with two more to come, in an effort to restore her vision. Rosa identified Palacios as the shooter, both at a field show-up at the scene and at trial.

Visalia Police Department Officers Curtis Brown and Matthew Doherty were on patrol at about 1 a.m. on June 23, 2008, when they heard gunfire nearby. Brown immediately turned north and drove down the street to try to determine where the shot came from. The officers saw a couple silhouettes run across the street. As Brown sped the car up, they both saw a muzzle flash accompanied by the sound of gunfire. The patrol car's driver's side spotlight was on and Brown activated the overhead emergency and takedown lights. The officers got to the scene in a few seconds.

The officers saw a group of five to seven people running across the road in front of them. The officers heard another shot and saw a muzzle flash off to the side of the road.

Brown estimated there were a total of five to six shots. Within seconds, two people ran in front of the patrol car. One was Palacios; he was wearing a white shirt and jeans, had longer, wavy hair, and carried a large shotgun. The other, Johnny Porras, was wearing a gray shirt and jeans, and had short hair. The two men, who were running side-by-side, looked directly at the patrol car.

Brown exited the vehicle, drew his weapon and commanded Palacios to stop. Palacios ran to a fence, then turned around and faced Brown. Brown yelled at him to drop his weapon. Instead of doing so, Palacios ducked down behind some vehicles, while Porras went over the fence. After a chase, Brown found the two men in a backyard. Brown knocked Porras down, but Palacios ran off, holding the shotgun. Two other officers apprehended Palacios, who was handcuffed and placed in the back of a patrol car.

After the chase, Brown found an unloaded shotgun lying in the grass near a telephone pole. It was a "home-defender combat-style" shotgun designed to hold extra ammunition. Doherty saw both shooting victims. There was a man covered in blood lying in the driveway; his right arm was almost completely severed at the elbow apparently from a shotgun blast. The other victim, an elderly woman, appeared to have had a shotgun pellet spray to the face; her eyeball was protruding out of her eye socket.

An autopsy revealed that Molina suffered three shotgun wound clusters: one on the right side of his head, one to the right side of his body extending to the right chest and abdomen, and one to his right leg. The last was caused by the shotgun's muzzle being closer to the body than the first two. Molina's right arm was partially amputated. He suffered several fractures and some missing teeth. Molina had multiple holes in his right lung with subsequent hemorrhage. He died from multiple penetrating shotgun wounds. A photograph taken at the autopsy showed that Molina had the words "South," "Side," and "Sur" and the number "13" tattooed on his fingers.

In 2007, Visalia Police Department Officer Steve Howerton was an assigned youth services officer at a high school, where he came into contact with Palacios. In December 2007, Palacios was arrested for battery on campus after getting into a fight. During the booking process at juvenile hall, Palacios spontaneously told Howerton "I'm a Norteno." Howerton wrote the statement on a field interview card. Howerton did not know if the fight involved gangs.

Mike Verissimo, of the Visalia Police Department's Gang Suppression Unit, testified as a gang expert. Nortenos are the largest gang in Tulare County. A recent trend is for gang members not to attract attention by their clothing or tattoos. Verissimo had daily contact with Nortenos and Surenos. He had known Molina's family since 2002. Nortenos identify with the color red and the number 14, while Surenos identify with the color blue and the number 13. Nortenos commonly tattoo one dot on one hand and four dots on the other. Surenos are the chief rival of the Nortenos; the rivalry has been going on since the early 70's. Nortenos and Surenos have committed murders, attempted murders, assaults with a deadly weapon, car thefts, vandalism and drug sales.

Verissimo testified about two predicate gang offenses by Nortenos. He had reviewed reports in this case as well. He opined that both Palacios and Porras were Norteno gang members, and that Molina was a Sureno. His opinion about Palacios was based on the following facts: (1) he was associating with Nortenos, (2) he was involved in a gang-related crime, (3) he admitted being a Norteno, and (4) he had been involved in prior gang-related crimes, which showed he had a history of fighting and wanted to fight with Sureno gang members. Palacios had twice admitted being a Norteno gang member; once, as Howerton stated on the field interview card he filled out, when Palacios was being booked into juvenile hall, and a second time when a probation officer was interviewing Palacios. In another report, it was stated that Palacios knew what the three sign meant and that it was a rival.

Verissimo explained the culture and hierarchy of the Nortenos and Surenos. Members advance in the hierarchy by committing crimes; acts of violence accelerate a gang member's advancement and killing a big rival is one of the quickest ways to rise up in a gang's hierarchy. In June 2008, both Palacios and Molina were street soldiers in their gangs. Palacios would gain a lot of status and respect for killing Molina. "Scrap" is a derogatory term for a Sureno; "North Side" is a phrase a Norteno might yell out. In response to a hypothetical based on the facts of this case, Verissimo opined the crimes would benefit the Northern street gang and would earn the gang respect on the street. The shooting of Andela in particular showed the community the gang was ruthless.

Defense Case

Scott Nash was awakened by a loud noise that night. He looked outside and saw a Hispanic male, with short hair and wearing a white t-shirt and blue jeans, come over a fence across the street, and run in front of and along the side of his house. His father, Larry Nash, looked out the back window of the same house that night and saw in the corner of the backyard a guy in a white t-shirt and dark pants who looked like he was going to jump over the fence. The next morning, Larry found some unused shotgun shells in his backyard. Brown had testified it was not possible for Palacios to have been in the area of the Nash house because he would not have had time to run that far south.

Samples were taken from Palacios's right and left hands to see if they contained gunshot residue. A criminalist found no particles of gunshot residue on the samples on either hand. A forensic scientist retained by the defense tested the shotgun in this case to see if it would produce gunshot residue. When the shotgun was fired once without cycling the next round into the chamber, no gunshot residue was produced. When the shotgun was fired five times and the pump cycled each time, a lot of gunshot residue was produced. The forensic scientist testified that he would have expected to find gunshot residue in this case, unless the shooter washed his hands or tried to clean them off.

DISCUSSION

I. The Prior Fights Evidence

Palacios contends the trial court erred in denying his in limine motion to exclude from evidence two fights upon which Verissimo, the gang expert, relied in reaching his opinion that Palacios was a Norteno. We disagree, as the trial court did not abuse its discretion.

A. Trial Proceedings

Before trial, defense counsel brought an oral motion in limine to exclude two pieces of evidence as hearsay bases for the gang expert's opinion: (1) Palacios's conviction as a juvenile under sections 242 and 148, and (2) Howerton's testimony that Palacios was involved in a second fight. Defense counsel stated the conviction was based on a fight over a pencil at a continuation school, which occurred when a Sureno gang member's pencil fell, Palacios, a Norteno gang member, picked it up, the pencil fell again, and the Sureno said no. Defense counsel had the police reports "and all that," and asserted the absence of gang allegations suggested the incident was not gang related.

The prosecutor responded that the gang expert could rely on anything he felt was important, and here the gang expert relied on the pencil fight because he put it in his report. The prosecutor asserted the existence of an adjudication was irrelevant, as he did not intend to bring it up, and he just wanted to bring in evidence that Palacios had a prior fight with a rival gang member, which was relevant both to gang membership and "this case as well." The trial court stated it would "allow that."

Defense counsel then addressed the "reference" to a "second fight," which he asked to be excluded. Defense counsel stated there were no police reports for the second fight and "literally nothing" to give any background on "that case" except "it's someone that was asked by [Palacios] and said, 'Oh, yeah, he got involved in two fights.'" Defense counsel argued that without information other than the police officer's statement

that a second fight occurred, the testimony that Palacios was involved in a second fight was "too tenuous and unreliable to be relied upon by any gang expert."

The prosecutor explained that the police officer, Howerton, would be on the stand, the prosecutor intended to introduce "an FI card" that Howerton filled out, Howerton was the main police officer on the high school campus who had become very familiar with Palacios, and "what he was describing was not only the first incident, the pencil incident, but the second one where he provided information again to Mr. Palacios in a fight with a rival gang member." The prosecutor stated he did not intend to overwhelm the jury with all the facts of these incidents through the gang expert and he was trying to support "what our gang expert is saying," that he "was aware when he looked at this evidence of two fights [at] Sequoia, both of [which] were involving the defendant, both involving Southern gang members, and he relied on that information from [] Officer Howerton." The prosecutor asserted the evidence furthered the gang expert's opinion that Palacios is a Northern gang member, and while defense counsel could cross-examine him on the lack of details regarding the fights, the expert could not be prevented from relying on the evidence.

Defense counsel responded that the problem with the second fight was the lack of information about the fight. The only information was on a Visalia Police Department field interview card Howerton filled out on December 4, 2007, which states: "'Suspect was involved in a second fight in a month.'" Defense counsel explained that while he had police reports and a juvenile adjudication on the first fight, on the second fight he had only a conclusory statement without foundation that Palacios was "'involved in the second fight[,]'" which was insufficient for an expert to rely on, as there was nothing to show how Howerton got the information about the second fight. Defense counsel asserted he could not cross-examine the expert on the second fight, as he had nothing with which to cross-examine him.

The trial court stated that a gang expert can rely on various statements, hearsay or not, and explained the inclusion of the information on a field identification card was "more than just rank speculation on the street," as the card apparently was prepared by Howerton. The trial court noted defense counsel could cross-examine the expert about whether he could rely on that information in forming his opinion. Defense counsel stated his "objection for the record." The trial court responded, "You have it."

At trial, Howerton testified that, when he was booking Palacios into juvenile hall for getting into a fight on campus, Palacios made a spontaneous statement that he was a Norteno. He did not testify regarding the details of the fight or the existence of a second fight. Verissimo, the gang expert, testified on direct examination that he opined Palacios was a Norteno gang member based, in part, on the fact he had been in prior gang-related crimes that showed he had a history of fighting and wants to fight with Sureno gang members.

On cross-examination, Verissimo confirmed he referred to prior gang-related offenses in which Palacios was involved, including a couple of fights with Surenos. Verissimo read reports from Howerton, and confirmed that an incident occurred in a classroom over a pencil in the possession of a Sureno. Verissimo did not know how the case was adjudicated. Verissimo admitted there really was no information about the other fight, just a note on a "little card" that there was a "second fight or something like that." Defense counsel asked if, as far as any gang-related crimes Palacios was involved in, "it's just those two fights that you're aware of?" Verissimo answered, "The fight and then this homicide." At defense counsel's request, the trial court took judicial notice of a juvenile adjudication dated December 4, 2007, which Verissimo confirmed was the date of the fight referred to in police reports. Verissimo confirmed the code section covering a gang enhancement is "186.22," a "242" is a battery, and section 148 is "running from the cop."

On redirect, the prosecutor asked Verissimo whether the absence of a gang conviction on the adjudication changed his opinion "in what you believe is a gang fight?" Verissimo responded, "No." On re-cross examination, Verissimo testified that if two gang members get into a fight, it was gang related no matter how it starts.

In his closing argument, the prosecutor argued Palacios's guilt was shown by the responding officer, the female eyewitnesses and the physical evidence. The only mention of the prior fights was when the prosecutor stated, in passing, that "Officer Verissimo also read some other reports about some fights and things like that, and he – his opinion was that [] Palacios was a Northern gang member."

B. Analysis

Palacios claims the two fights are not a proper basis for Verissimo's opinion because they are irrelevant and evidence of them is unreliable. He reasons that since the fights were not admissible as support for Verissimo's testimony, they were improperly admitted as highly prejudicial propensity evidence. He asserts the evidence was not relevant because the fights do not prove the disputed issue in the case, i.e. the identity of the shooter. He claims both incidents are unreliable – the pencil fight because the prosecutor failed to prove the fight involved a Sureno and the second fight because there was no evidence he was in a fight or that he was a willing combatant in the fight – and no evidence was presented that gang experts customarily rely on this type of information or that any such reliance is reasonable. He concludes that without evidence of the fights, there would have been nothing to support Verissimo's opinion that he was a "hard-core gang member who would go out and commit intentional violence for a gang, let alone a brutal murder[,]" and no motive for him to kill Molina.

We begin with the pencil fight. At trial, defense counsel objected to Verissimo's reliance on that fight because the adjudication did not include a gang allegation, which counsel asserted showed the fight was not gang motivated. On appeal, however, Palacios raises different objections, namely that the evidence is unreliable because the prosecutor

failed to prove the other party in the fight was a Sureno and irrelevant because the prosecutor failed to prove he knew the other person was a Sureno. "A motion in limine can preserve an appellate claim, so long as the party objected to the specific evidence on the specific ground urged on appeal at a time when the court could determine the evidentiary question in the proper context." (*People v. Solomon* (2010) 49 Cal.4th 792, 821; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [""""questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal""""]; Evid. Code, § 353.) Here, defense counsel's objection to the expert's reliance on the pencil fight differed from the grounds Palacios now asserts on appeal. Since the objections differ, Palacios forfeited his present contentions regarding the pencil fight.

Palacios makes several arguments that he preserved appellate review of his claim. First, he asserts review is permissible because the trial court's ruling was responsive to defense counsel's objection, citing *People v. Nelson* (2011) 51 Cal.4th 198, 223-224. In that case, however, the trial court ruled on the same ground the defendant asserted on appeal. (*Ibid.*) In contrast here, the trial court did not rule on the grounds Palacios now asserts – that the evidence was unreliable and irrelevant because the prosecutor failed to establish the other participant in the pencil fight was a Sureno or that Palacios knew that fact.

Second, he asserts review was preserved because defense counsel's argument was responsive to the prosecutor's trial brief, citing *People v. Williams* (1988) 44 Cal.3d 883, 906-907. While the People's trial brief contains an assertion that the People would seek to admit Palacios's bad acts while a Norteno to show intent and motive under Evidence Code section 1101, subdivision (b), at the pretrial hearing the prosecutor informed the court he had decided against seeking admission of Palacios's juvenile adjudication to show motive or intent apart from the gang expert's testimony. This exchange did not alert the trial court that defense counsel was objecting to admissibility of the pencil fight

based on the failure to establish the gang status of the other participant in the pencil fight or that Palacios knew of that status.

Finally, Palacios asserts review is preserved because the trial court ruled on the admissibility of the evidence before giving defense counsel an opportunity for "fuller argument," citing *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 426. This assertion fails because, unlike in *Marich*, where the appellant had objected below to a jury instruction it claimed on appeal was erroneous, defense counsel did not object below on the ground he seeks to raise here.

To avoid forfeiture, Palacios contends defense counsel was ineffective by failing to object on the grounds he now raises. It is Palacios's burden to prove ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081 fn. 10.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

"A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission [citation], but also that the motion or objection would have been meritorious, if the defendant is to bear his burden of demonstrating that it is reasonably probable that absent the omission a determination more favorable to defendant would have resulted." (*People v. Mattson* (1990) 50 Cal.3d 826, 876.) "Defendant has the

burden of establishing, based on the record on appeal [citations] and on the basis of facts, not speculation [citation], that trial counsel rendered ineffective assistance." (*Id.* at pp. 876-877.) "'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."'" (*People v. Weaver* (2001) 26 Cal.4th 876, 925 (*Weaver*).) Whether to object to arguably inadmissible evidence is an inherently tactical decision; hence, failure to object rarely establishes counsel's incompetence. (*People v. Maury* (2003) 30 Cal.4th 342, 415-416, 419.) "In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*Weaver, supra,* 26 Cal.4th at p. 926.)

On the record before us, we are unable to conclude that there could be no satisfactory explanation for defense counsel's failure to object on the grounds he now raises. (See *People v. Bell* (1989) 49 Cal.3d 502, 546.) Defense counsel possessed police reports and witness statements regarding the pencil fight, none of which are part of the appellate record. Those documents may very well establish that the other party to the fight was a Sureno and Palacios knew that. Defense counsel admitted as much when, in explaining to the trial court the facts of the fight, he stated "[t]he guy that the pencil belonged to is a Sureno and [Palacios is] a Norteno." It follows that defense counsel's decision to refrain from objecting on this point was not one for which there could be no satisfactory explanation. (See, e.g., *People v. Hart* (1999) 20 Cal.4th 546, 630.)

With respect to the second fight, the trial court found the information reliable because it was contained on a field information card filled out by Officer Howerton. Expert testimony may be premised on material that is not admitted into evidence, or on material that ordinarily is not admissible, such as hearsay, if that material is reliable and of a type upon which experts reasonably rely. (*People v. Gardeley* (1996) 14 Cal.4th

605, 618.) Thus Verissimo, as an expert witness, could testify as to the information on which he based his opinion, even if hearsay, provided the information was reliable. (Evid. Code, § 802; *Gardeley, supra*, 14 Cal.4th at pp. 618-619; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9, citing *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463 (*Duran*) [gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes and on information obtained from colleagues and other law enforcement agencies].) Information reported in writing by police officers and maintained for reference by the police department, such as field information cards, has been recognized as a permissible basis for another officer to rely on when forming an expert opinion. (Evid. Code, § 801; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 241-242 & fn. 3.) It is within the trial court's sound discretion to determine whether foundational requirements for an expert opinion have been met. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.) That discretion is broad and will not be disturbed on appeal absent a manifest abuse. (*Ibid.*)

Here, the trial court determined that the weakness in the evidence of the second fight was a question of weight rather than admissibility. Because the evidence was contained on a field information card filled out by Officer Howerton, the court concluded it met a threshold of reliability sufficient to allow the jury to determine the value of Verissimo's opinion and the extent to which he relied on this incident. Palacios cross-examined Verissimo regarding the information he relied on with respect to the second fight. Whether that information was sufficient to support the expert's opinion was a circumstance that goes to the weight the jury should give the evidence, but does not affect its admissibility. (See, e.g., *People v. Fulcher* (2006) 136 Cal.App.4th 41, 54 [any erroneous factual assumptions by expert could be addressed through cross-examination by showing there was no evidence to support the conclusion, therefore the objection goes to the weight not the admissibility of the expert's opinion].)

Palacios contends the second fight was not relevant to connect Verissimo's opinion with the purported foundation of that opinion, as evidence Palacios had been in an unidentified fight was not admissible to prove he was the shooter. Verissimo, however, was not using the evidence of the second fight to support an opinion that Palacios was the shooter; instead, he was using it to further his opinion that Palacios was a Northern gang member. Palacios's gang membership is relevant to whether the instant crimes were committed for the gang's benefit, an element of the gang enhancement of section 186.22, subdivision (b)(1). While Palacios claims his gang status was not in dispute, he did not stipulate to being a Norteno. Instead, he left it to Verissimo to establish that fact.[3] Whether Verissimo had sufficient information from the fights to use them to support his opinion went to the weight, not the admissibility, of the evidence.

In this context, we cannot conclude the trial court abused its discretion by allowing the jury to be the ultimate arbiter of the weight to be accorded the gang expert's opinions.[4]

II. Sufficiency of the Evidence on Counts 2 and 4

Palacios contends there is insufficient evidence to support his aggravated mayhem convictions in counts 2 and 4. He asserts there is no evidence he specifically intended to

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[3] Although Palacios also contends Verissimo improperly used the evidence to opine that he was a "street soldier," Verissimo never stated, and was never asked, the basis of this opinion.

[4] The recent California Supreme Court case of *Sargon Enterprises, Inc. v. University of Southern California* (Nov. 26, 2012, S191550) ___ Cal.4th ___ [2012 WL 5897314], which Palacios's appellate counsel relied heavily upon at oral argument, does not compel a different result. While our Supreme Court explained that trial judges have a substantial gatekeeping responsibility when it comes to expert testimony, which includes ensuring opinions are not speculative, based on unconventional matters, or grounded in unsupported reasoning, it also recognized that we review a court's execution of these gatekeeping duties for an abuse of discretion. (*Id.* at p. ___ [2012 WL 5897314 *14-16].) In this case, discretion was not abused.

sever Molina's arm with a gunshot or to sever the arm but let Molina live, or to put out or disfigure Andela Landeros's eye.

Under the substantial evidence test standard of review, we may not substitute our assessment of the evidence in place of the jury's assessment of the evidence, but rather, we view the evidence in the light most favorable to the judgment, to determine whether there is credible, solid evidence from which the jury could have found each element of the crime beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

Section 205 states, in pertinent part: "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." Specific intent to maim is an essential element of aggravated mayhem. (§ 205; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1167 (*Quintero*).) "[S]pecific intent to maim may not be inferred solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately." (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 835 (*Ferrell*).) Such intent may be inferred, however, "'from the circumstances attending an act, the manner in which it is done, and the means used, among other factors.'" (*Quintero,* at p. 1162.) For example, evidence that a defendant's attack was aimed at a vulnerable part of the victim's body, such as his or her head, supports an inference that the defendant specifically intended to cause a maiming injury. (*Ibid.; People v. Park* (2003) 112 Cal.App.4th 61, 69 (*Park*).)

With respect to the aggravated mayhem of Andela in count 4, Palacios intentionally focused his attack on a particularly vulnerable region of Andela's body.

Andela testified that when the shooter "saw me make a move, he shot at me[,]" and "[t]he minute I moved, he must have thought maybe I was going to attack him, but I wasn't armed." She also testified that the shot hit her in the right eye and on "all the side of my face." At the time of trial, she was unable to see out of her right eye. Doherty saw Andela's injuries; he thought it looked like she "had shotgun pellet spray to the face, the forehead, and her eyeball was protruding out of her eye socket." From this evidence, the jury reasonably could conclude Palacios specifically targeted Andela, shooting her with the shotgun in a particularly vulnerable area, the face, blinding her right eye.

The foregoing evidence plainly is sufficient to support the jury's finding that Palacios specifically intended to maim Andela. (*Quintero*, *supra*, 135 Cal.App.4th at p. 1163 [substantial evidence of specific intent to maim where defendant focused a knife attack on the victim's head, stopping after maiming the victim's face]; *Park*, *supra*, 112 Cal.App.4th at p. 69 [substantial evidence of specific intent to maim based, in part, on the scope of the attack, which was limited to victim's head, resulting in eight broken teeth]; *Ferrell*, *supra*, 218 Cal.App.3d at pp. 835-836 [specific intent to maim may be inferred from defendant shooting the victim in the neck at close range, causing her to become permanently paralyzed, because such a shot was highly likely to disable permanently and because the attack was directed and controlled].) While Palacios contends there must be evidence that he specifically intended the injury that actually resulted, i.e. that he intended to shoot out Andela's eye, based on the statute and cited cases, it is enough that Palacios intended to shoot at a vulnerable area of Andela's body, the face, which had a high probability of permanently injuring her face, including her eye.

With respect to the aggravated mayhem of Molina in count 2, the evidence established that Palacios and other Nortenos were gathered across the street from Molina's home. When Molina, a Sureno, returned home, the group approached him as he got out of his SUV. Palacios fired a shot from the back of the group. As he approached Molina, he fired at least five shots at Molina at close range. One shot hit the right side of

his head and forehead, breaking his teeth, fracturing his jaw and orbital bones, and penetrating his scalp and brain. Another shot hit his right chest and abdomen. A third shot, fired from a closer distance than the other two, hit the upper aspect of the posterior left leg. As Molina was being shot, Andela saw him raise his right arm to cover his face. Molina fell to the ground after the fifth shot. When Doherty arrived on the scene, he saw emergency personnel tending to Molina, who was covered in blood, as he lay on the ground; he also saw that Molina's right arm was almost completely severed at the elbow from what looked like a shotgun blast. Molina was taken to the hospital, where he died three days later after being declared brain dead. Medical treatment at the hospital included amputation of his right arm.

Palacios asserts the evidence shows only an intent to kill Molina indiscriminately, from which no inference of specific intent to maim can be inferred. The specific intent to maim may, and often does, exist simultaneously with, albeit secondary to, a more primary intent to kill. (See *Ferrell*, *supra*, 218 Cal.App.3d at p. 836.) Here, a jury could reasonably infer Palacios had a simultaneous intent to both kill and maim Molina. This inference can be found in the manner of the attack, which was deliberate, directed and controlled, and the pattern of the shots, which hit both vulnerable areas of Molina's body, namely his chest and head, as well as areas that would not necessarily result in death, such as his leg. From this, a reasonable inference could be made that Palacios was aiming at Molina with the intent to permanently disable, if not kill him. Moreover, the jury could reasonably conclude that, in the barrage of shots, some of which missed Molina, Palacios intended to disfigure Molina as a means of disabling his victim, thereby rendering him easier to kill. The fact that the specific intent to maim may have only been secondary to Palacios's primary intent to kill does not negate the existence of the specific intent to disfigure Molina and hence does not relieve Palacios of liability for aggravated mayhem.

The case on which Palacios relies, *People v. Lee* (1990) 220 Cal.App.3d 320 (*Lee*) is readily distinguishable. There, the defendant spontaneously attacked his neighbor with a barrage of punches to the head and kicks to the torso, causing the victim to sustain severe head trauma which caused permanent partial paralysis. On appeal, the court reversed the defendant's aggravated mayhem conviction, concluding the evidence was insufficient because it did not show more than a sudden, indiscriminate, and unfocused battery on the victim. (*Id.* at p. 326.) In contrast here, the record shows a planned attack on Molina with a shotgun; in the course of the attack, Molina attempted to protect himself by raising his right arm and Palacios responded by purposefully shooting at Molina's head, hitting his arm and disabling it. Palacios's selection of a shotgun and his use of it in overcoming Molina's protective gestures are ample evidence of planning, mode and means consistent with an attack designed to first disable and then kill. (See *Park, supra*, 112 Cal.App.4th at pp. 70-72.) Unlike the spontaneous battery in *Lee*, here there is ample evidence Palacios intended to permanently disable and disfigure Molina.

III. The Aggravated Mayhem Instruction

Palacios next contends the aggravated mayhem instruction misstated the elements of the offense. The jury was instructed on the aggravated mayhem count with CALCRIM No. 800 as follows: "The defendant is charged in Counts 2 and 4 with aggravated mayhem, in violation of Penal Code Section 205. To prove the defendant is guilty of this crime, the People must prove that, one, the defendant unlawfully and maliciously deprived someone else of a limb, organ, or part of her body – his or her body; two, when the defendant acted, he intended to permanently deprive the other person of a limb, organ, or part of his or her body; three, under the circumstances the defendant's act showed extreme indifference to the physical or psychological well-being of the person. [¶] Someone acts maliciously when he intentionally does a wrongful act or when he acts with the wrongful intent to annoy or injure someone else."

Palacios contends the jury instruction permitted conviction on counts 2 and 4 "based on an intent to deprive the victims of *any* part of his or her body, even if it merely reflected an intent to commit homicide or deprive a person of a different part of the body, with no specific intent to commit the maiming injury." He asserts the error misstated the elements of the offense, as it permitted the jury to convict him on a much lesser mens rea than the law requires.

The Attorney General argues Palacios forfeited his right to appellate review, as he did not request clarification or modification of the instruction. "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 (*Hudson*), quoting *People v. Andrews* (1989) 49 Cal.3d 200, 218.) "But that rule does not apply" if "the trial court gives an instruction that is an incorrect statement of the law" (*Hudson, supra*, at p. 1012) or "if the substantial rights of the defendant were affected thereby" (§ 1259). "'Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim – at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.'" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087 (*Ramos*), quoting *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

So, at least to that extent, we turn to the merits of Palacios's argument. Palacios asserts the instruction was erroneous because (1) it "permitted the jury to convict based on an intent to 'permanently deprive the other person of a limb, organ, or part of his or her body' that was *different* from the maiming injury (severance of an arm in count 2, a blinded eye in count 4)"; and (2) the phrase "organ or part of his or her body" in the intent portion of the instruction is so broad it encompasses intent to deprive someone of a vital organ "when such an intended deprivation would be no more than an intent to commit homicide." He explains that the instruction permitted the jury to convict him of

aggravated mayhem based on an intent to commit homicide by deprivation of *any* vital organ, resulting in the actual deprivation of a *different* part of the body.

This argument is premised on the assertion that to be guilty of aggravated mayhem the defendant must intend to cause the precise maiming injury that resulted from the defendant's actions. We do not agree. Section 205 provides that a person is guilty of aggravated mayhem when the person "intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." Nothing in the statute requires that a person intend to inflict the precise injury that resulted, only that the person intends to cause permanent disability or disfigurement, or deprivation of a body part. While case law describes the intent required as "the specific intent to cause the maiming injury" (*Ferrell*, *supra*, 218 Cal.App.3d at p. 833), none of the cases upon which Palacios relies[5] requires that the defendant intentionally cause the precise injury that resulted. For example, in *Ferrell*, the court found a specific intent to maim where the defendant shot the victim once in the neck, severing her spine and causing severe partial paralysis, since it did not take special expertise to know a shot in the neck from close range, if not fatal, is highly likely to disable permanently. (*Id.* at pp. 835-836.) Likewise here, it does not take special expertise to know that a shot to the face is highly likely to either disable permanently or to result in the deprivation of a body part, whether by shooting out an eye, scarring the face, or the victim having his arm blown off as he tried to protect his face from the shot. In either case, intent to maim can be inferred from a controlled, directed and limited attack to a vulnerable area of the body from which a jury could reasonably infer the defendant "specifically intended to disable [the victim] permanently." (*Lee*, *supra*, 220 Cal.App.3d at p. 326.)

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[5] Palacios cites *Lee*, *supra*, 220 Cal.App.3d 320; *Ferrell*, *supra*, 218 Cal.App.3d at p. 833; and *People v. Newby* (2008) 167 Cal.App.4th 1341).

The instruction given here was proper, in that it told the jury the prosecution must prove Palacios unlawfully and maliciously deprived someone of a limb, organ or part of his or her body, and that when he acted, he intended to permanently deprive the person of a limb, organ, or part of his or her body. Thus, the jury was required to find that Palacios intended to permanently deprive Molina and Andela of a limb, organ, or body part, and that he did deprive them of a limb, organ, or body part. Contrary to Palacios's assertion, the instruction did not permit a conviction on a "much broader basis than the law permits." Accordingly, we find no error in the instruction given.

IV. Sentencing Errors

Palacios contends the abstract of judgment must be amended to reflect that the trial court imposed a concurrent sentence on count 4. The Attorney General agrees and also points out that the abstract of judgment requires correction with respect to the sentence imposed on count 5. We agree that both corrections are required.

With respect to the sentence on count 4, the probation officer recommended in the probation report that the term in count 4 run concurrently with the term in Count 1. At sentencing, the prosecutor asserted that count 4 should be a consecutive sentence. In pronouncing judgment, the trial court stated, inter alia, that count 4 was to "run concurrent to Count 1." The prosecutor told the court that count 4 "should be consecutive[,]" but the trial court, while confirming the prosecutor's position that the count 4 term should be "[c]onsecutive to Count 1," did not change the sentence. The clerk's minute order states that count 4 is to "run concurrently with Count 1." The abstract of judgment, however, does not state whether the sentence is concurrent or consecutive.

With respect to count 5, Palacios pled no contest to that count in exchange for an indicated sentence of two years concurrent. In its oral pronouncement, the trial court stated that count 5 was a concurrent two-year term. The court's minutes and the abstract of judgment, however, state the term is a concurrent three-year term.

Where there are discrepancies between the oral and written judgment, the trial court's oral pronouncement controls over the abstract of judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) The abstract of judgment and the clerk's minute order must reflect the sentence the trial court orally imposed. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) The abstract of judgment must be corrected to reflect that count 4 is to run concurrent to count 1, and the clerk's minutes and abstract of judgment must be corrected to state that a two-year concurrent term was imposed on count 5.

DISPOSITION

The matter is remanded for the trial court to correct the clerk's minutes and abstract of judgment to state that the sentence imposed on count 5 is a two-year concurrent term, and to amend the abstract of judgment to state that count 4 is to run concurrent to count 1. The trial court is directed to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

Palacios has no right to be present during these proceedings. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1234-1235.) In all other respects, the judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Cornell, Acting P.J.

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Kane, J.